SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

In the Matter of the Application of

ESTHER NIDAM,

Petitioner,

Index No.: 883/11
Motion Seq. Nos.: 01, 02
Motion Dates: 02/20/11
03/15/11
XXX

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NASSAU COUNTY BOARD OF ASSESSORS a/k/a NASSAU COUNTY DEPARTMENT OF ASSESSMENT and the NASSAU COUNTY ASSESSMENT REVIEW COMMISSION a/k/a BOARD OF ASSESSMENT REVIEW OF THE COUNTY OF NASSAU,

Respondents.

The following papers have been read on these applications:

	Papers Numbered
Amended Notice of Petition (Seq. No. 01), Amended Petition and Exhibits	1
Notice of Motion (Seq. No. 02) and Affirmation	2
Affirmation in Reply to Opposition and in Opposition to Motion to Dismiss and Exhibits	3
Affirmation in Further Support of Motion to Dismiss	4

Upon the foregoing papers, it is ordered that the applications are decided as follows:

Petitioner brings this proceeding, pursuant to CPLR Article 78, for an order (1) annulling and setting aside the "arbitrary and capricious" determination of the Hearing Officer in a Small Claims Assessment Review Proceeding; and (2) directing that petitioner be awarded the monetary

relief requested in the small claims petition. Respondents move (Seq. No. 02), pursuant to CPLR § 3211(a)(7) and CPLR § 7804(f), for an order dismissing petitioner's petition and denying petitioner's application for failure to state a cause of action, or, if the Court is inclined to grant the relief sought by petitioner, to sever each of the individual petitioners' claims with the direction that they serve and file individual petitions with separate index numbers (therefore paying a separate index number fee and separate RJI fee) within fifteen (15) days after service of a copy of the order with notice of entry, deeming those which are not separately served and filed within the fifteen (15) day period abandoned and extending respondents' time to respond to the petition to thirty (30) days after an order and decision with notice of entry has been served upon respondents' counsel. Petitioner opposes respondents' motion.

Petitioner commenced the within proceeding pursuant to Article 78 of the CPLR seeking a judgment setting aside the September 22, 2010 determination of the Small Claims Assessment Review Hearing Officer for the 2010-2011 tax year and directing that petitioner be awarded the monetary relief requested in the Small Claims Petition - $790.33.

Petitioner submits that, on September 14, 2010, a Small Claims Assessment Review (SCAR) proceeding was held before Richard D. Lorge, Esq., the designated SCAR Hearing Officer. Mr. Lorge's September 22, 2010 decision stated, "[a]fter a hearing conducted with respect to this matter in which the assessing authority and the homeowners were present or represented by their authorized agents and at which both sides submitted written materials and made oral presentations and upon reviewing the materials submitted and evaluating the comparables and taking into account, among other things, location, living space, and amenities, I find that a reduction in the assessment is not warranted." *See* Petitioner's Petition Exhibit A. Petitioner argues that said decision was "arbitrary, capricious, unreasonable and contrary to law." Petitioner submits that the Hearing Officer based his decision on "only the respondent's evidence, which contained

factual/statistical inaccuracies. The County's evidence...denotes that the subject property's square footage is 4,432 and that it contains four and a half (4.5) bathrooms. The respondent used this information to generate a list of comparable properties, in order to calculate the assessment, and used this generated list to create an assessment value and as its only evidence at the hearing. However, both the square footage and number of bathrooms in petitioner's home are less than what the County presented. In the most recent inspection of the property that was conducted by the Nassau County Department of Assessment on June 9, 2009, it was evaluated that the square feet and bathrooms were less than what they had presented to the judge....it states that the property is 3,871 square feet, and that the house contains 2.5 bathrooms."

Petitioner contends that the comparables used by respondent as its lone piece of evidence at the SCAR Hearing were inappropriate to utilize in this matter because they were created based upon factual inaccuracies and they are distinguishable from petitioner's property. Comparables 1, 2, 3, and 4 contain 4.5, 4.5, 4.5 and 3 bathrooms respectively. Petitioner argues that it is "irresponsible to compare properties with 4.5 baths to Petitioner's property, which contains only two (2) full baths." Petitioner further contends that "comparables 2 and 4 have square footages of 4,610 and 3,998, respectively, both of which are significantly larger than the 3,600 estimated in the appraisal and the 3,871 in the County's inspection of Petitioner's property."

Petitioner adds that comparables 1, 2 and 3 offered by respondent at the SCAR Hearing were all newly constructed homes and that the most recent comparable offered was from 2009, not one of the four comparables being from 2010.

Petitioner argues that the SCAR Hearing Officer "failed to acknowledge the discrepancy in square footage and bathrooms, and based his decision on only the County's inaccurate comparables" and that he "abused his discretion in denying that Petitioner's SCAR Petition was arbitrary and capricious, based both on the evidence submitted at the SCAR hearing and the significant decline

in the real estate market."

Respondents, in their motion to dismiss the petition, argue that the "SCAR Hearing Officer did not act arbitrarily and capriciously, as the Petitioner's comparable sales were for residences with lesser amounts of square footage. Furthermore, Petitioner did not meet her burden of proof to overturn the SCAR Hearing Officer's decision." Respondents submit that petitioner's allegation that the SCAR Hearing Officer acted arbitrarily and capriciously has no merit. Respondents argue that they took the best information available and generated reasonable comparables, thereby fulfilling their evidentiary burden. Respondents contend that a property valuation by the assessor is presumptively valid and that said presumption can be defeated only by substantial evidence, followed by demonstrating overvaluation by preponderance of the evidence. Respondents argue that petitioner has provided flawed and inaccurate comparable sales and has not met her burden of proof.

Respondents submit that petitioner has offered thirty-five (35) comparables that are inaccurate and inapplicable to her case. Respondents state "[p]etitioner claims that accurate size of the premises is 3,871 square feet with two full baths and two half baths. Petitioner offers comparable properties that do not match the Premises. Petitioner's comparable properties are uniformly smaller. The largest comparable which the Petitioner presented is approximately 3,200 square feet. Many of the Petitioner's thirty-five (35) comparable properties are approximately one thousand, five hundred (1,500) square feet, or almost fifty (50%) smaller. This would place them in an entirely separate real estate bracket. None have two full bathrooms and two half baths; most have two bathrooms and no half baths. This, combined with a far smaller lot size and much smaller living area, render each and every one of the thirty-five (35) comparables inaccurate as the Premises is substantially and materially different from each and every comparable sales offered. The Petitioner has significantly undervalued her home. Therefore, the Petitioner has failed to meet her burden."

When a judicial hearing officer's determinations in a Small Claims Assessment Review (SCAR) proceeding for reduction of real property taxes are contested, the court's role is limited to

ascertaining whether those determinations have a rational basis. *See* NEW YORK REAL PROPERTY TAX LAW § 732(2) (McKinney 1997); *Yee v. Town of Orangetown*, 76 A.D.3d 104, 904 N.Y.S.2d 88 (2d Dept. 2010); *Sass v. Town of Brookhaven*, 73 A.D.3d 785, 900 N.Y.S.2d 383 (2d Dept. 2010); *Meirowitz v. Board of Assessors*, 53 A.D.3d 549, 861 N.Y.S.2d 414 (2d Dept. 2008); *Lauer v. Board of Assessors*, 51 A.D.3d 926, 857 N.Y.S.2d 724 (2d Dept. 2008); *Greenfield v. Town of Babylon Department of Assessment*, 76 A.D.3d 1071, 908 N.Y.S.2d 251 (2d Dept. 2010).

Hearings held pursuant to the Small Claims Assessment Review procedure are to be conducted on an informal basis, and the hearing officer is vested with the discretion to consider a wide variety of sources and information. *See Sass v. Town of Brookhaven, supra, quoting Meirowitz v. Board of Assessors, supra.* As previously stated, when a hearing officer's determination is contested, the court's role is limited to ascertaining whether that determination had a rational basis, that is whether it is not affected by an error of law or not arbitrary and capricious. *See* CPLR § 7803(3); *Sass v. Town of Brookhaven, supra.*

Applying these principles to the matter at bar, the Court finds that the Hearing Officer's determination did not have a rational basis and was arbitrary and capricious based upon the fact that said Hearing Officer relied upon incorrect information concerning the subject premises (specifically the square footage of said premises and the number of actual full bathrooms in said premises) in evaluating the evidence and reaching his decision. The decision specifically stated that the Hearing Officer took into account "among other things, location, *living space*, and amenities" (emphasis added). The Hearing Officer cannot base his decision on erroneous data that was actually determined to be incorrect by the same County agency that was initially responsible for the assessment. *See* Petitioner's Petition Exhibit H.

Consequently, respondents' motion to dismiss is hereby **DENIED**.

With respect to respondents' request to sever each of the individual petitioners' claims with the direction that they serve and file individual petitions with separate index numbers (therefore paying a separate index number fee and separate RJI fee) within fifteen (15) days after service of

a copy of the order with notice of entry, deeming those which are not separately served and filed withing the fifteen (15) day period abandoned, that request is also **DENIED**.

With respect to respondents' request to extend respondents' time to respond to the petition to thirty (30) days after an order and decision with notice of entry has been served upon respondents' counsel, CPLR § 7804(f) states, "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made by notice within the time allowed for an answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just;..." The generally accepted rule is that the provisions stating that respondent must be permitted to answer after denial of a motion to dismiss is mandatory, and that a respondent is entitled to answer where its motion to dismiss is denied. *See* 24 CARMODY-WAIT 2d §§ 145:369, 145:370. However, such procedure need not be followed and the proceeding can be resolved on the merits without providing an opportunity to serve an answer if the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer and there only remain questions of law, the resolution of which are dispositive. *See Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 845 N.Y.S.2d 880 (4th Dept. 2007); *Shellfish, Inc. v. New York State Dept. of Environmental Conservation*, 76 A.D.3d 975, 908 N.Y.S.2d 53 (2d Dept. 2010).

The Court finds that respondents have fully apprised the Court of all relevant arguments in their motion to dismiss and that all of the undisputed facts were fully presented in the parties' papers. Consequently, the Court finds that it is not necessary to grant respondents leave to answer the petition and that there will be no prejudice to respondents as a result of same. *See id.* Therefore, respondents' application to extend their time to respond to the petition to thirty (30) days after an order and decision with notice of entry has been served upon respondents' counsel is hereby **DENIED.**

The Court does, however, find that petitioner's relief is limited to a hearing *de novo*. Monetary relief is not a proper award in a CPLR Article 78 proceeding such as the one at bar. *See*

NEW YORK REAL PROPERTY TAX LAW § 736(2) (McKinney 1997).

Therefore, it is hereby ordered that the petition (Seq. No. 01) is **GRANTED TO THE EXTENT** that the determination of the hearing officer is annulled and the matter is remanded for a new SCAR Hearing.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
June 16, 2011